IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 397.

NELLIE DALE CLEMENS, *Petitioner,*

v.

WILLIAM L. CLEMENS, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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William L. Clemens, the above named respondent, submits the following brief in opposition to the petition for certiorari herein:

STATEMENT OF THE CASE.

This case is here on petition for certiorari filed by Nellie Dale Clemens, defendant in the District Court of the United States for the District of Columbia and appellant in the United States Court of Appeals for the District of Columbia.

Petitioner and respondent were united in marriage December 18, 1900, at St. Louis, Missouri, and thereafter lived together as husband and wife in Missouri and New York, except for three short periods of separation, until October 28, 1934, when they finally separated. They have not since lived or cohabited together (Orig. R. pp. 1, 8, 28), but have been and now are living voluntarily separate and apart from each other (Orig. R. p. 28).

Prior to separation, respondent was an employee of the National Surety Company in New York City. He obtained employment with the United States Housing Administration at Washington, D. C., and advised petitioner that it would be necessary for him to remain in Washington, but she informed him she would not come to Washington with him. He came to Washington on July 30, 1934, and has lived in the District of Columbia ever since, which place is his home (Orig. R. p. 28).

A short time after respondent came to Washington, petitioner motored down from New York, stopped at a hotel, saw and talked with petitioner, but refused to stay with him, and returned to New York, where she has lived ever since (Orig. R. p. 29).

About the month of February, 1936, petitioner brought a suit for legal separation and alimony against respondent in the Supreme Court of New York for the County of New York, during the pendency of which an agreement of separation, dated May 16, 1936, was entered into between the parties hereto (Orig. R. p. 29), a copy of which was annexed by petitioner to her answer filed in the first of the three divorce suits mentioned in the petition for certiorari herein at pages 2 and 3, namely, Equity cause No. 63,886 in the District Court of the United States for the District of Columbia. That agreement contained the following recitals:

> "WHEREAS plaintiff (petitioner here) and defendant (respondent here) heretofore and on or about October 28th, 1934, have separated and have ever since

lived and are now living separate and apart from each other.

* * * * * * * * *

"NOW THEREFORE it is hereby stipulated and agreed by and between plaintiff, defendant and the attorneys for the respective parties hereto, that:

* * * * * * * * *

" 'The parties hereto shall and may live separately and apart without the control of the other, and wheresoever they please' ".

In her answer, filed in said equity cause on or about October 12, 1937 (signed and sworn to by her September 28, 1937), petitioner alleged in paragraph 6 that

"* * * the separation agreement entered into between the parties is in full force and effect."

Because of that agreement, Equity cause No. 63,886 was dismissed on final hearing, respondent having been adjudged unable to prove desertion, the separation being voluntary.

In the second action mentioned on page 3 of the petition herein, namely, Civil Action No. 4617, which sought an absolute divorce on the ground of five years voluntary separation, petitioner filed an answer (signed by her personally but not sworn to) on or about March 5, 1940, in paragraph 4 of which she alleged:

"* * * the parties entered into an agreement of separation on the sixteenth day of May, 1936, in the City of New York; that that agreement is still in force and effect. * * *"

It is clear from these allegations that the agreement of May 16, 1936, continued in force and effect for approximately four years.

Civil Action No. 4617 in the District Court of the United States for the District of Columbia, filed November 1, 1940, was dismissed on final hearing by a judgment dated May 7, 1941, which recited:

> "That on March 6, 1940, a judgment was entered in the Supreme Court of the State of New York * * * in which it was found by the Court that in September, 1938, both parties were residents of the State of New York * * * that therefore in view of the husband's residence in New York in September, 1938, he cannot maintain this action * * *"

In the present case, Civil Action No. 11,290 in the District Court of the United States for the District of Columbia, the complaint was filed on May 7, 1941. Final hearing was had on March 16, 1943, and final judgment for absolute divorce on the ground of more than five years voluntary separation without cohabitation was entered March 22, 1943 (R. 7). An appeal therefrom was taken by petitioner to the United States Court of Appeals for the District of Columbia, and that court affirmed the judgment in a per curiam opinion on June 12, 1944 (R. 19).

SUMMARY OF ARGUMENT.

The Courts of the District of Columbia have given full faith and credit to the judgment and proceedings involved herein of the Supreme Court of New York for the County of New York.

A decree for limited divorce is not a bar to a subsequent action on different grounds for an absolute divorce.

The restraining order mentioned by petitioner merely enjoined the commencement of another action. It was issued after this proceeding was commenced. Respondent has not violated its provisions, as he has not commenced any action since it was entered.

The restraining order was void, as being in violation of the settled law in the State of New York, and was not entitled to be given full faith and credit.

Pendency of an action in one state is not a bar to the institution of another action in a different jurisdiction on the same subject-matter.

Public policy of states does not permit the enjoining of parties from proceeding in legal actions in another state on the same cause of action.

The purpose of the District of Columbia Statute is to permit termination of certain marriages in law that have ceased to exist in fact.

ARGUMENT.

As a specification of error, petitioner, on Page 1 of her Brief, argues that it was error for the courts of the District of Columbia to refuse full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York.

Full Faith and Credit Was Given to Foreign Judgment.

It is clear from an examination of the proceedings in the District Court of the United States for the District of Columbia that full faith and credit was given to the judgment of the New York court (R. 14, 15). In that judgment, the New York court adjudged and decreed that respondent here pay to petitioner the sum of $15.00 per week as and for her support and maintenance. In the judgment of March 22, 1943, the trial court in this case found as a fact that the parties were then and had been for more than five years living separate and apart from each other voluntarily, and adjudged that respondent pay to petitioner "to apply on a judgment of the Supreme Court of the State of New York for the County of New York * * * awarding and granting to the defendant herein (petitioner here) a decree of separation from bed and board, the sum of Sixty Dollars ($60.00) per month * * *" (R. 7, 8). That was the only part of the New York judgment requiring, in order that it might be given full faith and credit, recognition in the judgment entered in this cause.

Limited Divorce No Bar to Absolute Divorce.

A decree for a limited divorce does not bar a subsequent action on different grounds for an absolute divorce.

Foxwell v. *Foxwell*, 118 Md. 471, 475, 84 A. 552 (1912), citing *Stewart* v. *Stewart*, 105 Md. 297.
Edgerly v. *Edgerly*, 112 Mass. 53, 55 (1873).
Evans v. *Evans*, 43 Minn. 31, 32, 44 N. W. 524, 7 L. R. A. 448 (1890).
Bakula v. *Bakula*, 186 Minn. 488, 489, 243 N. W. 703 (1932).
Williams v. *Williams*, 156 Md. 10, 13, 142 A. 510 (1928).
Driver v. *Driver*, 24 Pa. Dist. 250.
Parks v. *Parks*, 73 App. D. C. 93, 116 F. 2d 556.

The foregoing authorities clearly demonstrate that, giving to the New York judgment full faith and credit, it is not a bar to a proceeding in another jurisdiction or even in New York for an absolute divorce on an entirely different ground from that on which the judgment of legal separation was based.

On page 9 of her brief, petitioner states

> "It will be remembered also that the New York Court first acquired jurisdiction over these parties and the subject-matter and restrained the husband from commencing any action or actions affecting the marital status of the parties outside the jurisdiction of that State."

Restraining Order Not Effective.

The restraining order or injunction referred to was entered by the New York Court on *August 7, 1941*. It restrained respondent from *commencing* any action or actions outside New York. This litigation was commenced *May 7, 1941* (petition p. 3), three months before the restraining order was issued. Respondent has not *commenced* any action or actions affecting the marital status of the parties outside New York since the restraining order was

issued. If that restraining order was valid, it is clear that its provisions have not been violated by respondent. But it is the contention of respondent that the restraining order was invalid and unenforceable and was improperly entered.

Action in One Jurisdiction No Bar to Suit in Another.

The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country, nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy.

Ryan v. *Seaboard, etc. R. Co.*, 89 Fed. 397.
White v. *Whitman*, 29 F. Cas. No. 17,561.
Title Ins. etc. Co. v. *California Dev. Co.*, 171 Cal. 173, 152 P. 542.
Gerke v. *Colonial Trust Co.*, 117 Md. 579, 83 A. 1092.
Sulz v. *Mutual Reserve Fund Life Assoc.*, 145 N. Y. 563, 40 N. E. 242.

Public Policy Forbids Injunction.

Upon principles of courtesy and public policy the power of a court of one state to enjoin the parties within its jurisdiction from proceeding in an action in another state will not be exercised ordinarily when the court of the other state has concurrent jurisdiction, unless there are peculiar equitable grounds.

French v. *Hay*, 22 Wall. 250, 22 L. ed. 857.
Pickett v. *Ferguson*, 45 Ark. 177.
Cunningham v. *Butler*, 142 Mass. 47, 6 N. E. 782.
Herfurth v. *Herfurth*, 77 App. D. C., 341, 135 F. 2d 948 (citing *Hyattsville Building Assoc.* v. *Bonic*, 44 App. D. C. 408 (1916), *Harlan* v. *Harlan*, 52 App. D. C., 98, 281 Fed. 602 (1922), and *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941).

In the case of *Kittle* v. *Kittle* (New York), 8 Daly's Rep. 72, the court said:

> "Our courts, from motives of comity and public policy, will not restrain parties, by injunction, from proceeding in actions commenced by them in other states, except in very special cases, to prevent injustice and oppression. This is the rule which has been recognized by adjudged cases in this State. (*Vail* v. *Knapp*, 49 Barb. 299; and the authorities there cited.)"

Neither the case in New York between these parties nor this proceeding is a "very special" case, nor does it appear that an injunction was necessary to "prevent injustice and oppression." Accordingly, it seems clear that the restraining order issued by the New York court on August 7, 1941, was contrary to the law of that State and, therefore, is invalid and unenforceable.

PURPOSE OF STATUTE INVOLVED.

In her petition and brief, petitioner contends that the construction placed on Title 16, Section 403, of the District of Columbia Code is erroneous, and that it does not seem reasonable that Congress intended to grant a husband an absolute divorce upon the ground of five years voluntary separation where he had been guilty of cruel and inhuman treatment of his wife, rendering it unsafe and improper for her to cohabit with him. (Petition, p. 5, Brief, p. 11.)

In the case of *Parks* v. *Parks*, *supra*, and again in the case of *Vanderhuff* v. *Vanderhuff*, No. 8590, decided June 26, 1944, and not yet reported, the United States Court of Appeals for the District of Columbia, in construing the statute here involved, has held that its purpose is "to permit termination in law of certain marriages which have ceased to exist in fact." The parties involved here have been separated since October 28, 1934, almost ten years. They entered into a voluntary agreement on May 16, 1936, over eight years ago. The petitioner brought an action for legal separation in February, 1936. Since the separation

she has not once expressed a desire to resume living with respondent. What the court said in the case of *Parks* v. *Parks, supra,* is peculiarly appropriate when applied to petitioner. In that case the following language appears:

> "Six consecutive years of separation had elapsed. The separation was not at first voluntary on the defendant's part; when the plaintiff deserted her, she begged him not to go. But from that time on she neither asked him to return nor made any other attempt to bring about a reconciliation. It is perhaps a fair inference that she reconciled herself to separation. But that, we think is not the question. Even if she did, in fact, wish her husband to return, in the course of time her silent acquiescence in the separation made it voluntary in the statutory sense. Desires which are not reflected in conduct have little or no social or legal significance. The law is full of instances in which the will that counts is the apparent rather than the secret will. The liberal purpose of the 1935 amendment points to this construction. *That purpose was to permit termination in law of certain marriages which have ceased to exist in fact.* This is such a marriage. We think the defendant's silent acquiescence made the separation **voluntary, in the statutory sense, within** less than a year after it began, and therefore more than five years before the plaintiff filed this suit. It follows that he is entitled to a divorce.
>
> "The fact that the separation resulted from the husband's fault is no defense, since the statute does not require that the separation originate in any particular way. It requires only that for five consecutive years the separation be voluntary. The separation agreement is no defense. * * *" (Italics added.)

In *Vanderhuff* v. *Vanderhuff, supra,* the same Court said:

> "We have already held that recrimination is not a defense in the case of voluntary separation from bed and board for five years."

Again in *Bowers* v. *Bowers,* decided June 26, 1944, 72 W. L. R. 843, the United States Court of Appeals for the

District of Columbia, in construing the same statute, used the following language:

> "The District of Columbia Code (1940), Sec. 16-403, authorizes divorce for 'voluntary separation from bed and board for five consecutive years without cohabitation.' The issue turns upon the continuing character of the separation, not its origin; but its origin is evidence of its continuing character. We have held that if both parties voluntarily and continuously acquiesce in separation during five years, the statute authorizes divorce *even though the separation was not originally voluntary on both sides.* Parks v. Parks, 73 App. D. C. 93, 116 F. 2d 556. It is equally true that if either party does not voluntarily and continuously acquiesce in separation during five years, the statute does not authorize divorce even though the separation was originally voluntary on both sides. *But one who contends that a voluntary separation ceased to be voluntary should have the burden of proving his contention.* The separation in the present case was originally voluntary on both sides. Although the wife afterwards asked her husband to return to her, the court was 'not convinced' that her requests were 'made in good faith.' It follows that the judgment should be affirmed." (Italics added.)

This case is like the *Parks* case in many respects. Even though the separation originally was not voluntary, so far as petitioner was concerned, she became reconciled to it as early as February, 1936, when she filed an action for legal separation in New York. She again evidenced her reconciliation thereto when she entered into the separation agreement of May 16, 1936. She has never, since filing her first action against respondent or, for the matter since the day of final separation, made the slightest attempt to effect a reconciliation with him. She has submitted no proof whatever that the separation ceased to be voluntary on her part after filing her original action for legal separation in New York. She has not sustained the "burden of proving" her contention, but asked the courts below and now asks

this Court to hold that the separation from her husband during the ten years of its duration has been involuntary on her part, when she has not evinced the slightest interest in a reconciliation with her husband and has made no attempt whatever to bring about a resumption of marital relations. The same situation would prevail if the separation continued for fifty years. It would be preposterous to bind respondent by the ties of matrimony to a wife who has no love or affection for him for a period of that length. It is equally as unreasonable to bind him for ten years, particularly when the applicable statute specifies that such marriages may be dissolved after the lapse of five years.

CONCLUSION.

Although probably unnecessary, respondent feels that one statement made in petitioner's brief should not go unchallenged. On page 10 of her brief, petitioner, through counsel, states:

> "It is one thing for a husband to desert his wife without presenting any violence or danger to her life or limb, and that continues for five years without any effort on her part to effect a reconciliation, but it is quite a different situation where he beats his wife so inhumanly as to render it unsafe and improper for her to cohabit with him."

There is no evidence in the record in this case showing that respondent ever so much as laid his hand upon petitioner, much less beat her. It would be as truthful to charge that he stabbed her with a knife or shot her with a pistol. The recital in the decree of the New York court is a formal one, included, it is understood, in every judgment of legal separation based upon cruelty, whether mental or physical. (See *Barber* v. *Barber*, 62 U. S. 582, 21 How. 582, 16 L. Ed. 226, 227; Sec. 1161, New York Civil Practice Act, Code Sec. 1762.)

Respondent respectfully contends that there is no merit in the petition for certiorari filed herein, and that it should, therefore, be denied.

Respectfully submitted,

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